

San Francisco Bay Conservation and Development Commission

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May 23, 2016

Mitch Stogner, Executive Director
North Coast Rail Authority (NCRA)
419 Talmage Road, Suite M
Ukiah CA 95482

Gregg Jennings
Sonoma Marin Area Rapid Transit (SMART) District Office
5401 Old Redwood Highway, Suite 200
Petaluma, CA 94954

SUBJECT: Unauthorized reconstruction of a washed out road in the Petaluma River, in SF Bay, located west of the Black Point Bridge and east of Grandview Avenue (which intersects with Beattie Avenue and Harbor Drive) in Novato, Marin County (Enforcement File No. ER2016.017)

Dear Messrs. Stogner and Jennings,

On March 29, 2016, a member of the public informed BCDC that a retaining wall had been constructed in a tidally influenced marsh channel west of the Petaluma River near the Black Point Bridge in Novato, Marin County. On March 30, 2016, I contacted SMART to obtain further information and was directed by Yasmin Mora to Gregg Jennings with whom I spoke by telephone on April 11, 2016, and was, thereafter, able to locate the attached Google Earth image of the project site, dated April 1, 2015, shown at two different scales.

Unauthorized Work in SF Bay. During our conversation, Mr. Jennings informed me that the section of road that crosses the waterway had washed out and was replaced with earthen fill, a retaining wall and culvert, by the North Coast Rail Authority pursuant to an operating agreement that it holds with SMART. I informed Mr. Jennings that this work constitutes the placement of fill within an area subject to the jurisdiction of the McAteer-Petris Act and requires the Commission's review and approval to remain in place.

Mr. Jennings stated that he believed the NCRA was exempt from the requirements of the MPA. After conferring with our legal staff, I emailed Mr. Jennings on April 12, 2016, and informed him that neither the NCRA nor the project are exempt from our jurisdiction and, as such, SMART (or the NCRA) should complete the BCDC permit application available on our website (<http://www.bcdc.ca.gov/permits/>) and provide the requisite accompanying

documentation¹. In the interim, I asked for photographs, a project description, and a copy of the operating agreement. On April 14, 2016, Mr. Jennings submitted a copy of a categorical exemption (see below) and in his email stated that for clarity he would send a separate email within a week regarding the road repair. I received no communication from Mr. Jennings between April 14 and 25, 2016.

On April 25, 2016, I again wrote to Mr. Jennings and requested that he, or an NCRA representative, send photographs of the unauthorized work, a project description, and a copy of the operating agreement to BCDC. I also asked for contact information for NCRA, stated that you needed to submit an application for the completed project very soon and that you could be liable for administrative civil penalties.

In an email on the same date, Mr. Jennings stated that he was sorry for the misunderstanding and that NCRA is the responsible party. He also stated that he had enclosed a copy of the operating agreement and contact information for NCRA in his previous email. In an email on the same date, I informed Mr. Jennings that I had located NCRA's contact information on the categorical exemption but that I would appreciate knowing the title of the named representative and receiving an introduction since Mr. Jennings was the joint point of contact. I stated that I had not received an operating agreement.

Resolution of Violation. Having not received any further communication from Mr. Jennings since April 25, 2016, and no communication at all from Mr. Stogner, I am now writing to state that you have 35 days to resolve this violation without any standardized fines, which are explained in the attached Appendix of Standardized Fines and Enforcement Options. Thereafter, SMART and/or the NCRA will be subject to standardized fines, which will continue to accrue until you have resolved this violation.

You may resolve this violation by either: (1) submitting a fileable application to BCDC and obtaining retroactive authorization for the as-built road replacement; (2) removing the unauthorized fill from our jurisdiction; or (3) a hybrid of these two options should we determine that the as-built project is not eligible, in part or in full, for retroactive approval.

Proposed Work in SF Bay. During our conversation on April 11, 2016, Mr. Jennings informed me that the NCRA plans in the near future to automate the swing-span Black Point Bridge by installing two control panels (each housed in a 12 by 18-inch box) on each bridge approach to facilitate easier closure of the bridge to allow trains to cross. By email dated April 14, 2016, BCDC received a Categorical Exclusion Worksheet, prepared by Mr. Stogner on behalf of the NCRA, and submitted to the Federal Railroad Administration (FRA) on May 10, 2010. FRA staff appears to have concurred with the Categorical Exclusion on August 3, 2010. The Categorical Exclusion elaborates upon Mr. Jennings' project description and states that "[n]o work will be

¹ To assist you in properly completing an application, enclosed are Appendix F, Application Exhibits (Proof of Legal Interest, Plans and Maps, and Environmental Documentation), and Appendix M, Commission Permit Application Fees, both of which are part of the Commission's regulations.

performed in the water or from the water, all work will be performed on the bridge using rail access. The construction activities for...the proposed project will involve mechanical and electrical system improvements to the bridge allowing [it] to be operated from the...approach spans."

On April 14, 2016, Mr. Jennings also submitted a letter from David Anderson, NCRA Project Engineer, to Milford Wayne Donaldson, State Historic Preservation Office (SHPO), dated May 10, 2010, providing notification of the Black Point Bridge Automation Project. NCRA's letter to SHPO states that

"[p]lanned repairs to the bridge would modify and replace mechanical and electrical systems of the swing span in order to automate the bridge. This would eliminate the need for rail workers to navigate the channel and would instead allow the bridge to be operated from the bridge approach spans on the land. No work will be performed in the water or from the water; all work will be performed on the bridge using rail access...All improvements will involve internal wiring within the existing operator house, and will not be visible from outside of the bridge house, thus preserving the historical and architectural value of this nearly 100 year old bridge."

While BCDC fully supports this project, it is subject to the requirement to obtain a permit from BCDC, as I stated in my email dated April 14, 2016. I recommend that you submit one joint application for the proposed and unauthorized work described in this letter and any other work that may have occurred or is planned in the river channel, in any tidally-influenced area and within 100 feet of any tidal waters of SF Bay.

We look forward to assisting you in obtaining the necessary permit/s and resolving the enforcement matter. You can reach me by telephone by calling 415/352-3609 or by email at adrienne.klein@bcdc.ca.gov.

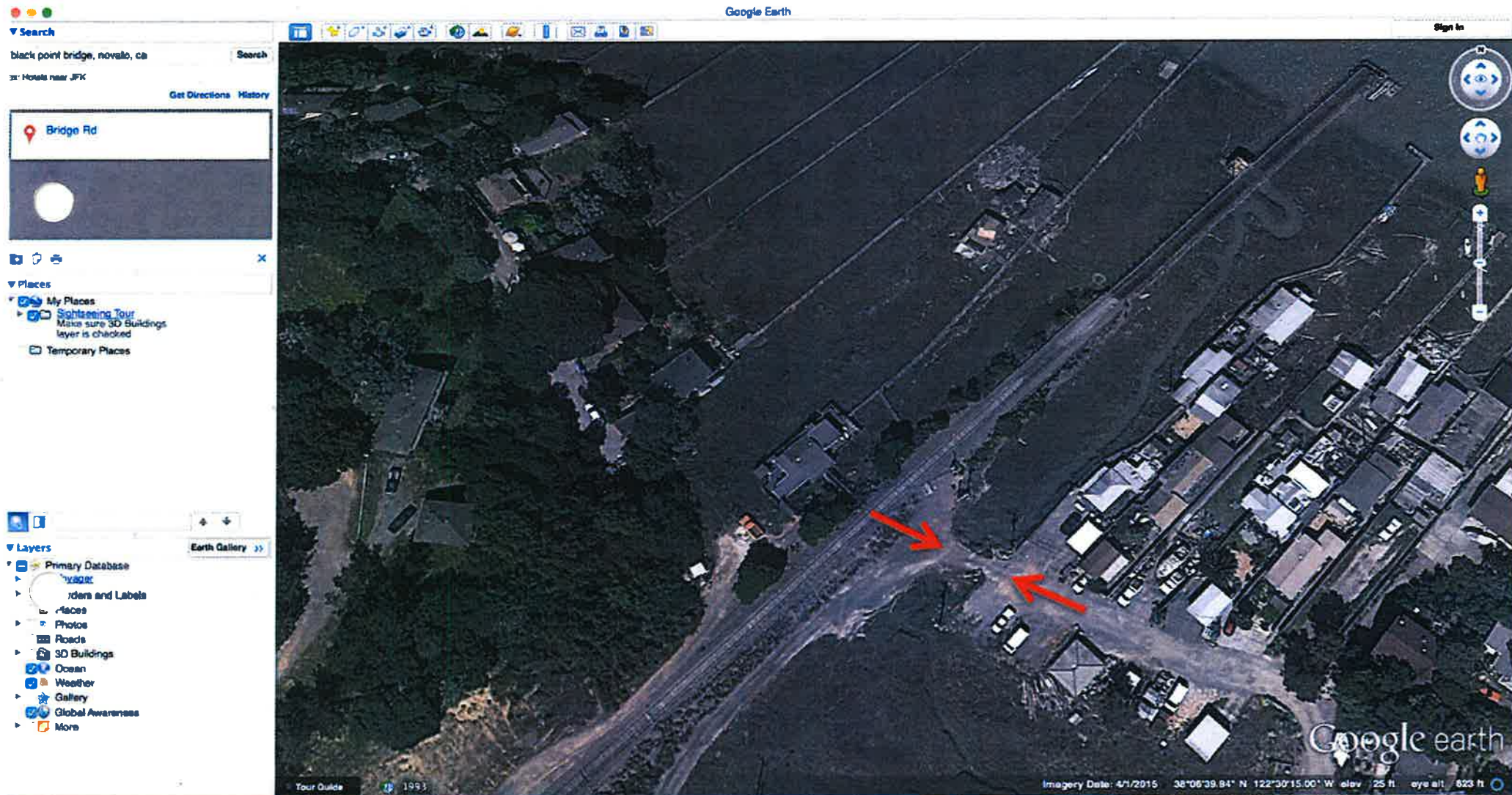
Sincerely,



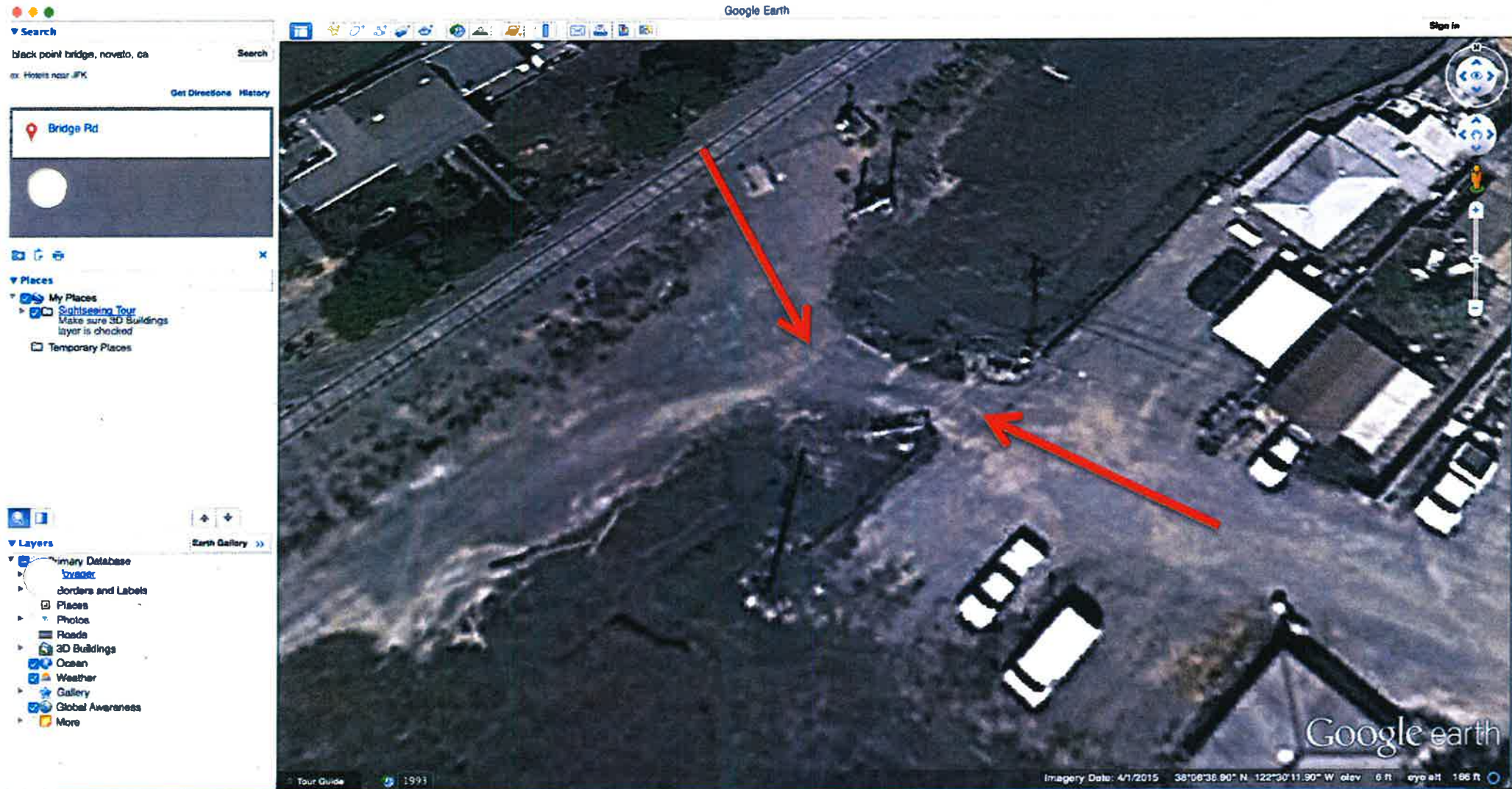
ADRIENNE KLEIN
Chief of Enforcement

Enclosures: 1. Google Earth image at two scales; 2. Appendix F, Application Exhibits (Proof of Legal Interest, Plans and Maps, and Environmental Documentation); 3. Appendix M, Commission Permit Application Fees; and 4. Appendix of Standardized Fines and Enforcement Options

cc: Marin County Code Enforcement Office
Judy Arnold, SMART Board Member and Chair, Marin County Board of Supervisors



→ ← Location of Road Repair



→ ← Location of Road Repair

Appendix F

Application Exhibits

The following information must be included as exhibits to an application. Failure to include all the required information will prevent an application from being filed.

Proof of Legal Interest

It is necessary for the applicant or the land owner to have adequate legal interest in the underlying property to carry out the project and comply with any conditions that may be a part of the Commission's approval. This legal interest must be one of the following:

- A fee interest that allows the proposed activity.
- A sufficient easement that allows the proposed activity.
- A leasehold whose remaining period of occupancy is long enough to provide a reasonable amortization period for the proposed project and whose terms allow construction and use of the proposed project.
- An enforceable option if the property owner is a co-applicant.
- The authority and commitment to acquire the property by eminent domain.

If the applicant is a public agency, corporation, partnership or other legal entity, evidence must be provided to ensure that the person who signs the application is empowered to represent and make commitments on behalf of the organization submitting the application. To accomplish this, such applications must include either a resolution authorizing the person who signs the application to represent and bind the applicant or bylaws which establish that the person who signs the application holds a position that is empowered to act on behalf of the legal entity. Corporate resolutions must be from the corporation's board of directors. Public agency resolutions must be from the city council, board of supervisors or similar highest policy body which governs the organization.

To establish that the applicant or co-applicant has adequate legal interest in the property on which the project is to be built, it is necessary for the application to include a property map and either a recently issued title report, a copy of a grant deed (both of which must include a map and a metes and bounds description) or other information of similar accuracy and reliability to show that the applicant or co-applicant holds the interest in the project site. An applicant for a project that involves the placement of fill in San Francisco Bay for purposes other than shoreline protection or the repair of existing structures must provide a title report or other acceptable documentation that is no more than two years old.

The property map (or maps) must either be a copy of an official parcel map obtained from a county assessor's office annotated as follows or a specially prepared map showing the following:

- All property lines, easement lines, and current assessor parcel numbers for the property on which the project will occur.
- A metes and bounds description for all property lines and easement lines.
- A north arrow, graphic scale, project name, the edge of the Commission's Bay or certain waterway jurisdiction, an identification of the exhibit as a property map, the date of the plan's preparation, and the name, address, and telephone of the person who prepared or annotated the map.

Plans and Maps

Every application must include a vicinity map and a project site plan.

The vicinity map must be either an 8-1/2" x 11" portion of a United States Geological Survey topographical map (7.5 minute series) or a similar 8-1/2" x 11" map which shows the project site in relation to the shoreline, major roadways, and other landmarks.

The project site plan must be at a scale which allows the details of the proposed project to be adequately illustrated. The plan (or set of plans if all the information cannot be shown on one drawing) must show exactly the nature, scope and location of the proposed work and clearly distinguish between existing and proposed conditions. The plan must include all of the following specific elements:

- The edge of the Commission's Bay or certain waterway jurisdiction.
- A line 100 feet inland from the edge of the Commission's Bay jurisdiction.
- Any salt ponds, managed wetlands, tidal marshes or tidal flats on the project property.
- Property lines.
- Location and names of nearby roads, streets or highways.
- All major utilities.
- Existing control points, important geographic, topographic or physical features, and all major fixed objects and structures on the project site.
- Existing and proposed topography, including especially the existing and proposed top and toe of the bank if solid fill, excavation or dredging is proposed in the application.
- Existing and proposed improvements.
- Existing and proposed building elevations.
- Existing and proposed public access areas, including any areas that will be reserved for public access as part of the project development and any improvements that are proposed to be made in the public access area, such as parking, landscaping, pathways, benches, etc.
- A north arrow, graphic scale, project name, an identification of the exhibit as a project site plan, the date of the plan's preparation, and the name, address and telephone number of the person who prepared the plan.

In addition to providing a large scale project site plan, applicants for major projects must also provide eight high quality copies of an 8-1/2" x 11" reduction of the site plan. Applicants for minor repairs or improvements or routine maintenance projects or for projects authorized by a regionwide permit need to provide only one high quality 8-1/2" x 11" reduction of the project site plan.

In some cases, instead of providing high quality 8-1/2" x 11" reductions that are suitable for reproduction, applicants may furnish 235 copies of exhibits of another size. Applicants should consult with the Commission's staff to determine if this option is appropriate.

Environmental Documentation

The California Environmental Quality Act and the National Environmental Policy Act

The California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA) require that the environmental impacts of a proposed development be assessed before any permit is granted for the project. These laws include specific exemptions for activities that have insignificant environmental impacts. If the project is covered by one of these exemptions, a brief statement must be provided to document this statutory exemption and cite the statutory section exempting the project. If available, this statement should be the environmental determination by the lead agency.

Similarly, other activities fall within categories that do not require the preparation of environmental impact documentation. If the project is covered by one of these exemptions, a statement must be provided to document this categorical exemption and cite the regulation section exempting the project. If available, this statement should be the environmental determination by the lead agency.

If another government agency has certified a "negative declaration" on the project, a copy of the declaration prepared in accordance with NEPA must be included with the application, and a copy of the declaration prepared in accordance with CEQA may be included with the application.

If the project requires the preparation of an environmental impact document to comply with NEPA, the document certified by the lead agency must be included with the application. If the document is longer than ten pages, a summary of the document not longer than ten pages must be included with an application for a major project.

If the project requires the preparation of an environmental impact document to comply with CEQA, the lead agency's certification and the document may be included with the application. If the document is longer than ten pages, a summary of the document not longer than ten pages must be included with an application for a major project. Note that when the certification and document are not submitted with the application, they must be submitted before the Commission considers and takes action on the application; see Sections 10516 and 10625.

Other Environmental Documentation. If any species that is affected by the project is known to be threatened or endangered, or if the California Department of Fish and Game or a federal wildlife agency has determined that a species is a candidate for listing as threatened or endangered, or if any species provides substantial public benefits, provide with the application the results of any consultation on the special status species that is required by federal and state endangered species acts.

If the project will likely result in a "take" of any special-status species under federal or state endangered species laws, provide a copy of the "take authorization".

Provide any required water quality certification or waiver or water quality discharge requirements from the San Francisco Bay Regional Water Quality Control Board.

NOTE: Authority cited: Sections 66632, Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 65940-65942, 66605, 66632(b) and (f) and 84308, Government Code; Sections 2770, 2774, 21080.5, 21082, 21160 and 29520, Public Resources Code; and the San Francisco Bay Plan.

HISTORY

1. New Appendix F filed 5-18-87; operative 6-17-87 (Register 87, No. 30).
2. Amendment filed 4-18-90; operative 5-18-90 (Register 90, No. 18).
3. Amendment of Environmental Documentation section filed 1-26-98; operative 2-25-98 (Register 98, No. 5).
4. Amendment filed 9-11-2008; operative 10-11-2008 (Register 2008, No. 37).

Appendix M

Commission Permit Application Fees

(a) All applicants for a Commission permit, permit amendment or amendment to an application shall submit as part of the application an application fee as identified in the following sections.

(b) The following permit application fees shall be effective until December 31, 2013 or until the Executive Director re-calculates the fees under subsection (c), whichever is later.

| Type of Permit Application | Application Fee 2008-2013 |
|---|---|
| Abbreviated Regionwide Permit | \$100 |
| Regionwide Permit | \$100 |
| Time Extension for any permit | \$150 |
| Nonmaterial Amendment To a Minor Permit Other Than a Time Extension With a Total Project Cost (TPC) of: | |
| —Less than \$5,000 | \$100 |
| —\$5,000 to \$50,000 | \$150 |
| —\$50,001 to \$100,000 | \$200 |
| —\$100,001 to \$600,000 | \$300 |
| —\$600,001 to \$100 million | 0.05% of TPC |
| —more than \$100 million | \$100,000 |
| Nonmaterial Amendment To a Major Permit Other Than a Time Extension With a TPC of: | |
| —Less than \$5,000 | \$100 |
| —\$5,000 to \$50,000 | \$150 |
| —\$50,001 to \$100,000 | \$200 |
| —\$100,000 to \$600,000 | \$600 |
| —\$600,001 to \$100 million | 0.10% of TPC |
| —more than \$100 million | \$100,000 |
| Material Amendment to permit | Same as for first time application |
| Material Amendment to application | 75% of original application fee |
| Emergency Permit | Same as for project as if not an emergency |
| Minor Permit with a total project cost (TPC) of: | |
| —Less than \$5,000 | \$150 |
| —\$5,000 to \$50,000 | \$175 |
| —\$50,001 to \$100,000 | \$350 |
| —\$100,001 to \$600,000 | \$1,050 |
| —\$600,001 to \$10 million | 0.12% of TPC |
| —\$10,000,001 to \$50 million | \$12,000 or 0.10% of TPC, whichever is greater |
| —\$50,000,001 to \$100 million | \$50,000 or 0.08% of TPC, whichever is greater |
| —\$100,000,001 to \$300 million | \$80,000 or 0.06% of TPC, whichever is greater |
| —\$300,000,001 to \$600 million | \$180,000 or 0.04% of TPC, whichever is greater |
| —more than \$600 million | \$240,000 |
| Major Permit with a total project cost (TPC) of: | |
| —Less than \$50,000 | \$350 |
| —\$50,000 to \$100,000 | \$700 |
| —\$100,001 to \$200,000 | \$900 |
| —\$200,001 to \$300,000 | \$1,100 |
| —\$300,001 to \$600,000 | \$1,200 |
| —\$600,001 to \$10 million | 0.20% of TPC |
| —\$10,000,001 to \$50 million | \$20,000 or 0.17% of TPC, whichever is greater |
| —\$50,000,001 to \$100 million | \$85,000 or 0.14% of TPC, whichever is greater |
| —\$100,000,001 to \$300 million | \$140,000 or 0.11% of TPC, whichever is greater |
| —\$300,000,001 to \$600 million | \$330,000 or 0.08% of TPC, whichever is greater |
| —more than \$600 million | \$600,000 |

(c) Calculation of Permit Fees for Subsequent Years.

(1) For each five year period following the effective date of this regulation, commencing in 2013, the Commission will calculate:

(A) the average fiscal year revenue generated from fees collected over the prior five years;

(B) the highest fiscal year total regulatory program costs (TRP) over the prior five years;

(C) twenty percent of the highest TRP ("target revenue").

(2) If the average revenue generated from fees is within five percent of the target revenue, then the Executive Director will not recalculate new fees from the following five years.

(3) If the average revenue generated from fees is more than five percent higher or lower than the target revenue, then the Executive Director will calculate new fees according to the method specified in subparagraph (4).

(4) Calculation Method. If new fees will be calculated pursuant to subparagraph (c)(3), the Executive Director shall use the following method.

(A) No earlier than July 1 and no later than October 1 of 2013 and in five year increments thereafter, the Executive Director shall calculate the fees that will apply to applications received in the following five calendar years.

(B) The fees shall be calculated in the following way:

(i) Divide the target revenue derived from subparagraph (c)(1)(C) by the average revenue generated from fees derived from subparagraph (c)(1)(A). This is the adjustment factor.

(ii) Adjust the permit application fees by multiplying each fee by the adjustment factor.

(5) The "total regulatory program costs" (TRP) shall be based on the amount of revenue appropriated to support the Commission's regulatory program in the Budget Act for that fiscal year. The total regulatory program costs shall be calculated by: (A) identifying the direct costs for employee compensation, contracts, and equipment and facilities that are allocated to the Commission's permit and enforcement activities; (2) adding to the direct costs the indirect costs such as administrative, legal, and other support allocated to the regulatory program; and (3) subtracting any reimbursements, grants, abatements or other income received to support regulatory program activities.

(6) The adjusted fees shall be effective on January 1 of the following calendar year and shall remain effective for five years or until the Executive Director calculates the new fees, whichever is later. All calculated figures shall be rounded up to the nearest dollar.

(d) Total Project Cost.

(1) "Total project cost," means all expenditures, including the cost for planning, engineering, architectural, and other services, made or to be made for designing the project plus the estimated cost of construction of all aspects of the project both inside and outside the Commission's jurisdiction.

(2) The total project cost for an amendment to a permit shall consist of only the total project cost of the subject matter of the amendment application.

(3) The Commission shall use the cost stated by the applicant in the application to BCDC to determine the total project cost unless the Executive Director determines that the amount stated does not appear to include the total project cost or to reflect accurately all project costs.

(4) Whenever the Executive Director determines that the stated project cost does not appear to include the total project cost or to reflect accurately all project costs, he or she shall return the application unfiled and state his or her reasons for concluding that the total project cost not included or why the stated cost does not accurately reflect all project costs or the Executive Director shall hold the application unfiled until the applicant verifies the total cost figures by having an estimator selected by the Executive Director and prepaid by the applicant review and certify as complete and accurate all project costs.

(e) Fees for Projects Involving More than One Category. Projects involving two (2) or more categories, (i.e., shoreline construction and filling as part of one (1) project), will not be charged the total of the fees that would be due if each part of the project were considered as a separate application. Rather, the fee is the single amount due under highest fee category into which the project falls.

(f) When Fees are to be Paid. All fees shall be paid before the Commission files a permit application. No fees shall be charged for preliminary inquiries and requests for information prior to the filing of an application.

(g) Refunds.

(1) A \$100 refund of an administrative permit application fee shall be made if the application is withdrawn prior to the mailing of the administrative

trative listing for the application. No refund shall be made for an administrative permit application after listing.

(2) For all other fees, the first \$200 hundred dollars is not refundable and the remainder shall be refunded if the application is withdrawn prior to mailing notice of a public hearing either on whether the application is complete or on whether the project is consistent with the applicable Commission policies but shall not be refunded after the notice of the public hearing has been mailed.

(h) Fees in Special Circumstances.

(1) The fee for resubmitting an application that had earlier been denied by the Commission or withdrawn by the applicant before a Commission vote shall be seventy-five percent (75%) of the fee that would be charged for a new application covering the same work. Such fee shall be in addition to the fee charged for the original application.

(i) Fees for Applications Arising from an Enforcement Investigation.

(1) The Commission shall double all relevant application fees if the Executive Director determines that the applicant submitted the application in response to an investigation by the staff or the Commission of a possible violation of the McAteer-Petris Act, the Suisun Marsh Preservation Act, or the terms or conditions of a permit.

(2) Applications shall be presumed to have arisen out of an enforce-

ment investigation if the staff prepared a written enforcement report prior to the applicant presenting the application for filing.

(j) Appeal of Fee Determination.

(1) Any person who believes a fee charged is not correct under these regulations may appeal to the Commission any objection that the applicant, the Executive Director, and the Chair cannot resolve.

(2) Pending resolution of the amount of the fee, the applicant shall pay the fee that the Executive Director assesses and shall file a letter explaining why the fee is incorrect.

(3) When an applicant appeals a fee, the Commission shall determine the correct fee at the time it votes on the application or at the time for commenting on the administrative listing, whichever applies.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Section 66632(b) and (c), Government Code; and Section 29520(b), Public Resources Code.

HISTORY

1. New Appendix M (combination and amendment of former section: 10330-10338) filed 11-20-91; operative 12-20-91 (Register 92, No. 8).
2. Amendment of Appendix M and amendment of NOTE filed 10-14-2004; operative 10-14-2004 pursuant to Government Code section 11343.4 (Register 2004, No. 42).
3. Amendment of Appendix M and NOTE filed 12-11-2008; operative 1-10-2009 (Register 2008, No. 50).

[The next page is 580.5.]

APPENDIX

Standardized Fines and Enforcement Options

Regulation 11386(e)(4) For the failure to obtain a Commission permit prior to undertaking any activity that can be authorized by an administrative permit.

Enforcement Options. Pursuant to section 11386 of the BCDC's administrative regulations, you may resolve the penalty portion of the alleged violation by paying the standardized fines described below or you have the option to seek resolution through a formal enforcement proceeding that would involve a public hearing. If any of your actions are determined to be knowing and intentional violations or violate a term of a cease and desist order, the law (sections 66641.5(c) and 66641 of the McAteer-Petris Act, respectively) provides that we may refer this matter to the Office of the Attorney General, which could subject you to significant court imposed penalties.

Standardized Fines. If the alleged violation is fully corrected within 35 days of the date of this letter, no civil penalty will apply. If a fileable application is submitted between 36 and 65 days and a permit is obtained within 155 days after the date of the mailing of this letter or the unauthorized activity is completely corrected between 36 and 65 days, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$2,000. If a fileable application is submitted between 66 and 95 days and a permit is obtained within 185 days after the date of the mailing of this letter or the unauthorized activity is completely corrected between 66 and 95 days, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$5,000. If a fileable application is submitted or the unauthorized activity is completely corrected more than 95 days after the date of the mailing of this letter, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$5,000 plus \$100 per day from the 96th day to the date a permit is obtained or the unauthorized activity is completely corrected.

Cease and Desist and Civil Penalty Order. If you have not obtained the Commission's authorization or corrected the alleged violation within 125 days of the date of this letter, you may no longer have the option to settle this matter with standardized fines and we may, pursuant to sections 66638 and 66641.5(e) of the McAteer-Petris Act, commence a formal enforcement proceeding that could lead to the issuance of a cease and desist and civil penalty order with an administratively imposed civil penalty of between \$10 and \$2,000 per day up to a maximum of \$30,000 per alleged violation.